In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 1207

JIMMY DANE BURKE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 400 F. 2d 866.

JURISDICTION

The judgment of the court of appeals was entered on September 23, 1968. A petition for rehearing was denied on February 26, 1969. The petition for a writ of certiorari was filed on March 27, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether, in a prosecution for assault on a federal officer, 18 U.S.C. 111, the government must prove that the defendant knew the victim was a federal officer engaged in the performance of his duties.

STATEMENT

In the United States District Court for the Eastern District of Louisiana petitioner was convicted of assaulting a federal officer, in violation of 18 U.S.C. 111. On January 17, 1967, he was sentenced to imprisonment for one year. The court of appeals affirmed (Pet. App. A, 400 F. 2d 866).

The evidence showed that on the morning of April 9, 1965, a civil rights demonstration march was conducted on Columbia Road in Bogalusa, Louisiana (R. 25). A substantial crowd gathered along the sidewalks to observe the demonstration. A number of local and state police were on hand, as were approximately twenty FBI agents (R. 67). Among the agents was Robert L. Wertman, who was equipped with a camera and assigned to take photographs of any incidents which might involve a violation of federal law (R. 23). At the intersection of Third Street and Columbia Road three men, including petitioner, broke from the crowd of onlookers and attacked some magazine photographers (R. 59). Agent Wertman, clothed in ordinary dress, went to the site of the disturbance and began to take pictures. After petitioner had been momentarily restrained by local police from assaulting the magazine photographers, he rushed toward

Wertman and attacked him. One blow struck Wertman on his shoulder and neck (R. 36-37). Petitioner was then restrained and arrested by another FBI agent. There was evidence that someone had shouted prior to the attack on Wertman that "He's an F.B.I. agent" (R. 38-39). Petitioner testified that he heard no shouting, and did not know Wertman's federal status until after his arrest (R. 81-82). The court instructed the jury that knowledge of the federal identity of the victim was not an element of the offense (R. 130).

ARGUMENT

Petitioner has demonstrated no sound reason for re-examining the recent decisions in *Pipes* v. *United States*, 399 F. 2d 471 (C.A. 5), certiorari denied, March 24, 1969 (No. 1327 Misc., this Term); *McEwen* v. *United States*, 390 F. 2d 47 (C.A. 9), certiorari denied, 392 U.S. 940; *United States* v. *Heliczer*, 373 F. 2d 241 (C.A. 2), certiorari denied, 388 U.S. 917; *United States* v. *Wallace*, 368 F. 2d 537 (C.A. 4), certiorari denied, 386 U.S. 976; and *United States* v. *Montanaro*, 362 F. 2d 527 (C.A. 2), certiorari denied, 385 U.S. 920. See also *United States* v. *Lombardozzi*, 335 F. 2d 414 (C.A. 2), certiorari denied, 379 U.S. 914; and *Bennett* v. *United States*, 285 F. 2d 567 (C.A. 5), certiorari denied, 366 U.S. 911. These cases all agree that in a prosecution under 18 U.S.C. 111 the government need not prove that the accused knew the person he assaulted was a federal agent. In our brief opposing certiorari in *Wallace* (No. 1023 Misc., O.T. 1966) and *Montenaro* (No.

460, O.T. 1966) we set forth the reasons why we believe that the decisions holding such knowledge not an element of the offense correctly construe 18 U.S.C. 111, as amended in 1948. In brief, we showed that Congress did not use such words as "knowingly" or "intentionally" to write a requirement of scienter into the statute, and that Congress "merely sought to provide a federal forum for the trial of cases involving various offenses against federal officers in the performance of official duties." *United States* v. *Lombardozzi*, *supra*, 335 F. 2d at 416. The cases cited by petitioner holding that knowledge is an element all preceded the 1948 revision to 18 U.S.C. 111. Following the revision, the Fifth Circuit did continue to hold that scienter was an element of the offense, *Hargett* v. *United States*, 183 F. 2d 859, 864-865; *Hall* v. *United States*, 235 F. 2d 248. However, in its most recent decisions (*Bennett* and *Pipes*, *supra*, and petitioner's case) that court has indicated that it now accepts the generally prevailing view that knowledge of the federal character of an officer is not a necessary element of the offense.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
MERVYN HAMBURG,
Attorneys.

MAY 1969.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 348893 663